LEE NGAK PIEW

v.

PP

HIGH COURT MALAYA, PULAU PINANG
ZALEHA ZAHARI J
[CRIMINAL APPEAL NO: 41-102-98]
30 JULY 1999

CRIMINAL PROCEDURE: *Jurisdiction of court - Magistrate's court - Whether magistrate had jurisdiction to hear offences under Women and Girls Protection Act 1973 - Accused charged before magistrate's court for an offence under s. 19(1) - Whether charge legally preferred - Whether case triable before Sessions Court - Subordinate Courts Act 1948, s. 87(1) - Women and Girls Protection Act 1973, ss. 19(1), 31(1)*

CRIMINAL PROCEDURE: *Charge - Duplicity of - Charge of living on earnings from prostitution - Section 19(1) Women and Girls Protection Act 1973 - Inclusion of words "wholly or in part" in charge - Whether a defect - Whether charge bad for duplicity*

CRIMINAL PROCEDURE: *Sentence - Adequacy of sentence - Charge of living on earnings from prostitution - Section 19 Women and Girls Protection Act 1973 - Sentence of four months imprisonment and fine of RM6,000 - Whether excessive*

The appellant was charged before the magistrate's court for an offence of "knowingly living wholly or in part on the earnings of the prostitution of six persons" pursuant to s. 19(1) Women and Girls Protection Act 1973 ('the Act'). The appellant pleaded guilty to the charge whereupon the learned magistrate convicted and sentenced him to four months imprisonment and a fine of RM6,000 in default six months imprisonment. The appellant appealed and argued that the convicition and sentence ought to be set aside as (i) the inclusion of the word "wholly" as well as "or in part" in the charge was bad for duplicity; and (ii) offences under the Act could only be legally tried before the Sessions Court, and the magistrate, therefore, had no jurisdiction to hear the charge in question. It was also argued that the sentence passed, in any case, was excessive.

Held:

[1] The determination of the issue of jurisdiction calls for the construction of not only s. 31(1) of the Act, but also the provisions of the Subordinate Courts Act 1948 as amended by Act A434, as well as the construction of the provisions of Act 434 itself.

[2] The natural and ordinary meaning of s. 31(1) leads only to one conclusion, *ie*, that in "West Malaysia" only a "Sessions Court" is vested with jurisdiction to try an offence under the Act, whilst in "Sabah and Sarawak" it falls under the jurisdiction of "a Magistrate of the First Class". In the event, applying the *maxim "expressio inius est exclusio alterius"*, a Magistrate of the First Class in West Malaysia has no jurisdiction to hear offences under the Act.

[3] It is true that pursuant to the amendments made to s. 87(1) of the Subordinate Courts Act 1948 (*vide* Act A434), the jurisdiction of a magistrate had been enhanced and that a magistrate had jurisdiction to impose the maximum sentence imposable for offences under s. 19(1) of the Act. It ought to be noted, however, that the legislature, in so amending s. 87(1), had deemed it fit and necessary to also make amendments to specified written laws as prescribed in the Schedule to Act A 434, such as ss. 4(2), 14 and 40 of the Juvenile Courts Act 1947 and s. 118 of the Customs Act 1967 ('the Customs Act').

[3a] The amendments to s. 118 of the Customs Act is significant as that section, prior to its amendment, was in *pari materia* with s. 31(1) of the Act. Be that as it may, by the amendments, offences under the Customs Act was taken out of the jurisdiction of the Sessions Court in West Malaysia and placed under the jurisdiction of a Magistrate Court of the First Class, wherever situated, making no distinction whether it be in West Malaysia or in Sabah and Sarawak.

[4] Clearly, by amending specified laws as contained in the Schedule to Act A434, the legislature was cognisant of the fact that, over and above the enhancement of jurisdiction of a magistrate in s. 87 of the Subordinate Courts Act 1948, there was a need to make consequential amendments to provisions such as s. 118 of the Customs Act in order for Magistrate Courts of the First Class to have jurisdiction to hear offences under the respective legislation. It follows that, if the legislature had intended that Magistrates of a First Class in West Malaysia ought to deal with offences under the Act, it would have made the same consequential amendments to the Act as it did to s. 118 of the Customs Act. There being no such amendments, it must further follow that only a Sessions Court is vested with jurisdiction to hear offences under the Act.

[Conviction and sentence set aside; appellant ordered to be tried in Sessions Court.]

Case(s) referred to:
Ng Kook Kin v. PP [1995] 3 CLJ 905 ***(refd)***
Tey Kee Chuan & Satu Lagi [1995] 1 CLJ 802 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 305
Customs Act 1967, s. 118
Lembaga Kemajuan Ikan Malaysia Act 1971, s. 20
Subordinate Courts Act 1948, s. 87(1)
Women and Girls Protection Act 1973, ss. 19(1), 31(1)

For the appellant - Yeap Chye Choon; M/s Zainal Azhar & Co
For the respondent - Umar Saifuddin Jaafar DPP

Reported by WA Sharif

JUDGMENT

Zaleha Zahari J:

Lee Ngak Piew ("the appellant"), was convicted by the magistrate, Magistrate Court, Georgetown, Pulau Pinang on 4 June 1998 for an offence of knowingly living wholly or in part on the earnings of the prostitution of six persons named in the charge preferred against him contrary to s. 19(1) Women and Girls Protection Act 1973 (hereinafter referred as "the Act") and punishable under the same.

The appellant (who was unrepresented at the proceedings in the Court below) pleaded guilty to the charge preferred against him. The magistrate found the appellant guilty, recorded a conviction against him and then sentenced the appellant to four months imprisonment from date of arrest and also fined him RM6,000 in default 60 days imprisonment. This is an appeal against both conviction and sentence.

The appellant subsequently retained counsel to act for him. Several issues were raised in the Petition of Appeal, the main issue being a point of law as to whether a Magistrate Court had jurisdiction to hear offences under the Act. The arguments of Counsel for the appellant on the issues raised may briefly be stated as follows: He submitted that the inclusion of the word "wholly" as well as the words "or in part" in the charge was bad for duplicity. He further submitted that according to s. 31(1) only a Sessions Court has jurisdiction to hear offences under the Act. He urged this Court to give effect to this provision which confers exclusive jurisdiction upon a Sessions Court to hear such offence. According to him, by reason of this express exclusive provision, a magistrate therefore has no jurisdiction to hear this case against the appellant. On the issue of the sentence, counsel submitted that the sentence imposed on

the appellant was excessive; that the magistrate had erred in taking into account extraneous matters into consideration; that he had erred in concluding that the appellant was a "towkay" when there was no evidence to support this conclusion. According to him, the consideration of this factor had coloured the thinking process of the magistrate when he awarded the punishment that he did.

The Deputy Public Prosecutor (the "DPP") took issue. The first point raised was a procedural point. He submitted that according to s. 305 of the Criminal Procedure Code a person who had pleaded guilty to a charge, (as in this case) had no right to appeal but could only apply for revision.

On the issue of whether or not a magistrate has jurisdiction to hear offences under the Act, the DPP's submission were as follows. According to the DPP a magistrate is empowered to hear cases under the Act based on the general jurisdiction conferred upon a magistrate by s. 87(1) of the Subordinate Courts Act 1948 as amended by Act A434 which came into force on 1 July 1978. According to the amended s. 87(1), a magistrate is now empowered to impose a sentence not exceeding five years, fine not exceeding ten thousand ringgit, whipping up to twelve strokes or a combination of such sentences. The DPP submitted that as a person charged under s. 19(1) of the Act was only liable to be sentenced to imprisonment not exceeding five years or to a fine not exceeding ten thousand ringgit, or to both, a magistrate accordingly had, effective 1 July 1978, jurisdiction to hear offences under the Act, including s. 19(1). This contrasts with the power of a magistrate prior to the amendment made by Act A 434. The position prior to the amendment was that a first class magistrate only had jurisdiction to impose a sentence not exceeding two years imprisonment, a fine of five thousand ringgit, whipping up to six strokes, or any sentence combining any of the sentences aforesaid. The DPP urged this court to hold the preferment of the charge against the appellant in the Magistrates Court to be valid and to also hold that a magistrate has jurisdiction to hear this case against the appellant.

The court's attention was then drawn to two cases which dealt with a similar point of construction as in this case, ie, the decision of YA Dato' Mohd. Ghazali bin Yusoff JC (as His Lordship then was) in *Tey Kee Chuan & 1 Lagi* [1995] 1 CLJ 802 and that of YA Dato' Abdul Malik Ishak J in *Ng Kook Kin v. Public Prosecutor* [1995] 2 MLJ 35. Both judges were dealing with the construction of the provisions of the Lembaga Kemajuan Ikan Malaysia Act 1971 of which s. 20 is in *pari materia* with s. 31(1) of the Act.

In the case of *Tey Kee Chuan* YA Ghazali JC ruled that a magistrate had jurisdiction to hear offences under that Act in question by reason of the enhanced jurisdiction conferred on a magistrate in s. 87(1) of the Subordinate Courts Act 1948 consequent upon its amendment by Act A434.

However in the latter case of *Ng Kok Hin*, in considering the same point of construction in respect of an offence under the same Act as in *Tey Kee Chuan*, Dato' Abdul Malik J came to a different conclusion. Dato' Abdul Malik J ruled that effect must be given to the ordinary and natural meaning of the words contained in s. 20 of that Act in question. His Lordship further held that, notwithstanding the enhancement of the jurisdiction of a magistrate by the amendment to s. 87(1) of the Subordinate Courts Act 1948 by Act A434, a magistrate has no jurisdiction to hear an offence under that Act in question.

The DPP informed this Court that although these two decisions were not binding on this Court by reason of them being of a co-ordinate jurisdiction with this Court, he considered it necessary to bring them to the attention of this court to assist it in making a considered decision in this appeal.

Should this court however hold that a magistrate has no jurisdiction to hear offences under the Act and that offences under the Act fall under the exclusive purview of a Sessions Court, the DPP urged this court not to acquit and discharge the appellant but to remit this case to the Sessions Court for trial as this appeal is being allowed by this court on a technical point. The DPP submitted that the appellant would not be prejudiced by such an order as the appellant had not been subjected to a full trial. According to him, public interest requires this case to be referred to the right court for decision.

I have given very careful consideration to the arguments presented before me on the issue of whether a magistrate has jurisdiction to hear offences under the Act. In my view the determination of this issue as to jurisdiction calls for the construction of not only s. 31(1) of the Act, but also the provisions of the Subordinate Courts Act 1948 as amended by Act A434, as well as the construction of the provisions of Act A434 itself.

Section 31(1) of the Act

It may be useful to set out s. 31(1) of the Act at this stage. It reads as follows:

> 31. (1) Notwithstanding the provisions of any written law to the contrary, a Sessions Court judge in West Malaysia and a Court of a Magistrate of the First Class in Sabah and Sarawak shall have jurisdiction to try an offence under this Act and to award the full punishment for any such offence.

The cardinal rule of construction is of course to read the statute literally, that is, to give the words used by the Legislature their ordinary, natural and grammatical meaning. And where the language of the law is clear, effect must be given to it. In construing a statute, resort may also be had to the principle *"expressio unius est exclusio alterius"*, the expression of one thing excludes one not expressly mentioned.

Applying the first rule of construction to the words in s. 31(1) of the Act, and giving them their ordinary and natural meaning, I am of the view that it can only lead to one conclusion. It is clear and unambiguous. It unequivocally provides that in "West Malaysia" only a "Sessions Court" is vested with jurisdiction to try an offence under the Act, whilst in "Sabah and Sarawak", it falls under the jurisdiction of "a Magistrate of the First Class".

To apply the second rule of construction to s. 31(1) of the Act, the express mention of one excludes those not expressly mentioned, would, in my view, bring about the same result. I hold that the express conferment of jurisdiction on "a Magistrate of the First Class in Sabah and Sarawak" in s. 31(1) and making no mention whatsoever to "a Magistrate of the First Class in West Malaysia" must necessarily be construed by this court to mean that "a Magistrate of the First Class in West Malaysia" has no jurisdiction to hear offences under the Act.

Act A434

Turning now to the interpretation of the provisions of Act A434 and as to its effect on s. 31(1) of the Act in particular. It is not in issue that, effective 1 July 1978, pursuant to the amendments made to s. 87(1) of the Subordinate Courts Act 1948, the jurisdiction of a magistrate had been enhanced. Commencing 1 July 1978, a magistrate had jurisdiction to impose the maximum sentence imposable for offences under s. 19(1) of the Act.

How does one reconcile the amended s. 87(1) of the Subordinate Courts Act 1948 with the express provision of s. 31(1) of the Act? In determining this issue I am of the view that the intention of the Legislature in enacting Act A434 must be deduced by reading Act A434 as a whole. I note that the Legislature had, in enhancing the jurisdiction of a magistrate by amending s. 87(1) of Subordinate Courts Act 1948, at the same time, in its wisdom, deemed it fit and necessary to make amendments to specified written laws as prescribed in the Schedule to Act A434. For example, the amendments made to the Juvenile Courts Act 1947 and the Customs Act 1967 ("the Customs Act").

In the case of the Juvenile Courts Act 1947, the Schedule to Act A434 deleted reference to "President of a Sessions Court" in s. 4(2) and substituted these words with the words "Magistrate of A First Class"; thereafter, the words "Sessions Court" in s. 4(5) was substituted with the words "Court of a Magistrate of the First Class". Consequential amendments were also made to the appeal provisions in s. 14 of the Juvenile Courts Act where the words "Sessions Court" were substituted with the words "Court of a Magistrate of a First Class" as well as in s. 40 by the inclusion of words "and a Court of a Magistrate of the First Class".

The amendments made by the Schedule of Act A 434 to s. 118 of the Customs Act is more on point to this case as s. 118 is the provision relating to the conferment on the Sessions Court with jurisdiction to hear offences under the Customs Act. Prior to its amendment by the Schedule of Act A434 s. 118 Customs Act was in *pari materia* with that of s. 31(1) of the Act. It reads as follows:

> 118. Notwithstanding the provisions of any written law to the contrary, a Sessions Court in the States of Malaya or a court of a Magistrate of the First Class of Sabah and Sarawak shall have jurisdiction to try any offence under this Act and to award the full punishment for any such offence.

Arising from the amendment made by the Schedule of Act A434, ie, the deletion from s. 118 of the Customs Act the words "a Sessions Court in the States of Malaya or" and the words "in Sabah and Sarawak", s. 118 of the Customs Act now reads as follows:

> Notwithstanding the provisions of any written law to the contrary a Court of a Magistrate of the First Class shall have jurisdiction to try any offence under this Act and to award the full punishment for any such offence.

Thus, arising from the amendments made by the Schedule in Act A434 to s. 118, it is placed beyond doubt that offences under the Customs Act was taken out of the jurisdiction of the Sessions Court in West Malaysia and instead placed under the jurisdiction of a Magistrate Court of the First Class, wherever situated, making no distinction whether it be in West Malaysia or in Sabah and Sarawak.

Whether the decision not to amend other legislation with similar provisions as s. 118 Customs Act be intentional, or unintentional, arising from the draughtsman's oversight, the duty of the court is clear, and that is to give effect to the words used by the Legislature. Clearly, by amending specified laws as contained in the Schedule to Act A 434, it would appear that the Legislature was cognizant of the fact that, over and above the enhancement of jurisdiction of a magistrate in s. 87 of the Subordinate Courts Act 1948, there was a need to make consequential amendments to provisions such as s. 118 Customs Act in order for Magistrate Courts of the First Class to have jurisdiction to hear offences under the respective legislation in question. I am therefore of the view that if the Legislature intended Magistrates of a First Class in West Malaysia to deal with offences under the Act, then it would have made the same consequential amendments to the Act as it did to s. 118 of the Customs Act.

Applying the same canons of construction specified earlier on in this judgment to all of the provisions of Act A434, and reading Act A 434 as a whole, and giving the words used by the Legislature their ordinary and natural meaning, as well as applying the maxim *expressio unius est exclusio alterius*, fortifies my earlier finding that only a Sessions Court is vested with jurisdiction to hear offences under the Act.

In the light of my findings I therefore hold that the conviction and sentence recorded against the appellant by the magistrate to be null and void and is hereby set aside. I do not consider it necessary for this court to rule on the other issues raised in this appeal except to consider what further order this court should make consequential upon the setting aside of the conviction and sentence.

This court must balance the principles of fairness to the accused on the one hand, and public interest, on the other; that persons who were guilty of crimes should be brought to justice and not be allowed to escape scot-free merely because of some technical defect. The fact that the conviction recorded against the appellant was not recorded after a full trial but consequent upon a plea of guilt is also relevant. The appellant's counsel has also conceded that this was a proper case for the court to remit to the Sessions Court for trial.

I agree that in the circumstances of this case the appellant would not be prejudiced by remitting this case to the Sessions Court for trial. That it is in the public interest that I so direct.

The appeal is hereby allowed. The conviction and sentence against the appellant is set aside and the fine paid to be refunded to the appellant. I further order that this case be remitted to the Sessions Court for trial. The appellant is hereby ordered to appear before the Sessions Court on 2 August 1999 for mention. Bail is extended.